



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

November 9, 2012

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The Honorable Stephen H. Martin
Member, Senate of Virginia
Post Office Box 700
Chesterfield, Virginia 23832

Dear Senator Martin:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether a Virginia locality may adopt and apply any ordinance, standard or other requirement to an alternative onsite sewage system that is more stringent than, in addition to, or otherwise exceeds the regulations, standards and requirements of the Virginia Department of Health, where the failure to satisfy the local ordinance, standard or requirement could result in the denial of the right to install such a system, when sewers or sewerage disposal facilities are unavailable and when the proposed system is of a type that has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which it is to be operating.

Response

It is my opinion that a Virginia locality cannot adopt requirements and standards for alternative onsite sewage systems that are in addition to or more stringent than those enacted by the Board of Health and administered through the Virginia Department of Health when the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

Background

Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health. In 2009, the General Assembly directed the Board of Health, by the enactment clause of § 32.1-163.6, to "adopt regulations establishing performance requirements and horizontal setbacks necessary to protect public health and the environment for alternative systems permitted pursuant to the Board's regulations implementing this chapter. Such regulations...shall contain operation and maintenance requirements consistent with the requirements for alternative onsite sewage systems contained in § 32.1-164."¹ Pursuant to this enactment language, the Board of Health did enact regulations

¹ 2009 Va. Acts chs. 220, 296.

for alternative onsite sewage systems.² During the same legislative session, the General Assembly also amended Virginia Code § 15.2-2157 specifically to prohibit localities from banning “the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health” in areas where sewers or sewerage disposal facilities are not available.³ The amendments to § 15.2-2157 further provided in subsection (D) that localities “shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.”⁴

In 2010, you asked this Office whether § 15.2-2157(C) operated to prevent a locality from requiring, by ordinance, that a landowner obtain a special exception to the zoning ordinance in order to construct an alternative onsite sewage system under the circumstances contemplated by subsection (C). In response, this Office opined that § 15.2-2157(C) precluded such a local requirement provided that (i) there was no sewer or sewerage disposal facility available and (ii) the alternative system had been approved by the Department for use in the circumstances and conditions in which the proposed system is to operate.⁵ In so opining, this Office observed the following:

Pursuant to [Va. Code § 15.2-2157(A) and (C)], the special exception requirement may be valid only if a public sewer is available and offered to the individual seeking to install the alternative onsite sewage system. The locality retains the general authority pursuant to § 15.2-2157(A) and § 15.2-2128 to regulate, inspect, and deny applications for onsite sewage systems where a public sewer or sewerage facility is available; but § 15.2-2157(C) clearly states that when “sewers or sewerage disposal systems are not available, a locality shall not prohibit the use of alternative onsite sewage systems...” To require a special exception application for an alternative onsite sewer system that meets the conditions set forth in § 15.2-2157(C) effectively would give the local governing body the option to prohibit the system, a result not permitted by that subsection.⁶

Subsequently, this Office received an opinion request letter from Delegate L. Scott Lingamfelter, asking:

- 1) Are the strictures in Virginia Code Section § 15.2-2157 limited to maintenance standards and maintenance requirements as argued by the Attorney for Fauquier County?
- 2) Does the general language in Code Section § 15.2-2157(A) authorize a County to adopt requirements other than maintenance requirements in addition to or stricter than those set forth in the Department of Health regulations?⁷

² See 12 VA. ADMIN. CODE §§ 5-613-10 through 5-613-210; 2009 Op. Va. Att’y Gen. 3. Pursuant to 12 VA. ADMIN. CODE § 5-613-40, the regulations are designed to be a supplement to the Sewage Handling and Disposal Regulations, 12 VA. ADMIN. CODE § 5-610 *et seq.* promulgated by the Virginia Department of Health, and prescribe certain requirements for alternative onsite sewage systems depending upon the designer of the system. See 12 VA. ADMIN. CODE §§ 5-613-10 through 12 VA. ADMIN. CODE § 5-613-210.

³ See 2009 Va. Acts chs. 786, 846; VA. CODE ANN. § 15.2-2157(C) (2012).

⁴ Section 15.2-2157(D).

⁵ 2010 Op. Va. Att’y Gen. 53.

⁶ *Id.* at 54-55.

⁷ A third question, which dealt with recommendations for legislation in the event either question was answered in the affirmative, is not material to this inquiry. Letter of L. Scott Lingamfelter, Member of the Virginia House of Delegates to the Honorable Kenneth T. Cuccinelli, Jr., Attorney General of Virginia (August 3, 2011).

This Office responded by letter dated March 9, 2012, opining in response to the first question that a locality may not adopt a maintenance standard that exceeds the standards set by the State Board of Health and, thus, that the specific bond requirement detailed in the facts of the letter was impermissible pursuant to § 15.2-2157(D).⁸ In response to the second question, this Office opined that a non-maintenance standard that exceeds state regulations is not a violation of § 15.2-2157(C), "provided [such standards] do not function so as to in effect ban the use of an alternative system where the state regulations would allow for its operation."⁹

You indicate that certain localities have interpreted the March 9, 2012, opinion of this Office to authorize the adoption and enforcement of ordinances requiring more stringent standards for alternative onsite sewage systems than those required by the Virginia Department of Health where there is no sewer or sewerage disposal facility available. Specifically, you relate that a developer *in a locality for which sewage facilities are not available* wishes to develop his property for homesites requiring the use of alternative onsite sewage systems. Further, you state that although the proposed alternative sewage systems meet the criteria established by the Virginia Department of Health for use in the particular circumstances and conditions in which they are to be operating, the locality has informed the applicant developer that it is suspending indefinitely the disposition of his applications for alternative systems where the applications do not meet the locality's more stringent requirements for the systems, specifically, that there be fewer than 10 inches from the water table for mound systems and fewer than 12 inches from the water table for drip systems.¹⁰ You conclude that, for this property, the application of the locality's more stringent ordinance effectively prohibits the use of alternative onsite sewage systems.

You also report other examples of localities implementing more stringent requirements for alternative onsite sewage systems than those required by the Virginia Department of Health, with these more stringent local requirements being applied in circumstances where no sewer or sewerage disposal facility is available. You note that among such more stringent local requirements are: a larger minimum square footage for alternative drainfield size; duplex pump systems for all septic fields in residential subdivisions; and a requirement that the treatment system for a dwelling exceeding 7,500 square feet in living area must be over-designed by 50 percent.

Applicable Law and Discussion

Pursuant to Virginia Code § 15.2-2157(A), when sewers or sewerage facilities are not available, a locality has the general authority to regulate,¹¹ inspect, and require the installation and maintenance of onsite sewage systems in order to protect public health.¹² A county or town also has the general authority to deny applications for onsite sewage systems when the locality has adopted a master plan for sewers.¹³

⁸ 2012 Op. Va. Att'y Gen. No. 11-100, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2012opns/11-100%20Lingamfelter.pdf>.

⁹ *Id.* at 3-4.

¹⁰ See 12 VA. ADMIN. CODE § 5-613-80. Table 2 provides the minimum vertical separation distance to a limiting feature.

¹¹ Section 15.2-2157(A) was amended in 2005 to designate the first paragraph as subsection (A), but the authorization for localities to regulate onsite sewage systems predated that amendment. 2005 Va. Acts ch. 814. That broad authority was restricted by the General Assembly's 2009 amendments adding subsections (C), (D) and (E) to § 15.2-2157. 2009 Va. Acts chs. 786, 846.

¹² See, e.g., § 15.2-2126 (2012) (requiring notice and public hearing for the establishment or extension of sewer systems to serve three or more connections); § 15.2-2127 (2012) (authorizing localities to disapprove sewage

Although localities have the authority to regulate onsite sewage systems, § 15.2-2157(C) specifically prohibits them from banning "the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health" in areas where sewers or sewerage disposal facilities are not available.¹⁴ Furthermore, in subsection (D) the legislature mandated that localities "shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164."¹⁵ Section 32.1-164 provides that the regulations of the State Board of Health may include "standards for the design, construction, installation, modification and operation of sewerage systems" as well as "performance requirements for nitrogen discharged from alternative onsite sewage systems that protect public health and ground and surface water quality."¹⁶ The Board's Alternative Onsite Sewage Regulations, which are a supplement to its Sewage Handling and Disposal Regulations,¹⁶ provide a definition of maintenance and prescribe certain maintenance and performance standards, vertical separation, and horizontal setback requirements which must be met by the owner and designer of the sewage system.¹⁷ The Sewage Handling and Disposal Regulations also provide for minimum reserve area requirements¹⁸ for the design of a system.

As noted above, localities do have the general authority pursuant to § 15.2-2157(A) to regulate sewage systems within their boundaries as long as that regulation does not provide for maintenance standards or requirements in excess of those articulated in the Board of Health Regulations, as required by § 15.2-2157(D). The December 3, 2010, Opinion of this Office delineated permissible and impermissible local ordinance requirements for alternative systems. First, the Opinion found that localities may not adopt maintenance standards for alternative systems that exceed those promulgated by the Board of Health. Second, localities are authorized to regulate, inspect and deny applications for alternative systems pursuant to §§ 15.2-2128 and 15.2-2157(A), but this authorization is substantially limited by § 15.2-2157(C) in cases where public sewer facilities are unavailable. Third, where public sewer facilities are unavailable, and a property owner meets the Board of Health's regulatory requirements, a local ordinance exceeding such standards is without authorization from the General Assembly if its enforcement could result in the denial of such an application.

The March 9, 2012, Opinion of this Office is consistent with the December 3, 2010, Opinion in that it finds that where public sewage facilities are available to a landowner, localities may indeed adopt standards and regulations for alternative systems that exceed those promulgated by the Board of Health

systems if the locality finds for certain reasons that the sewage system is not capable of serving the proposed number of connections); § 15.2-2128, *infra*.

¹³ See § 15.2-2128 (2012) ("Notwithstanding any other provision of general law relating to the approval of sewage systems, the governing body of any county or town which has adopted a master plan for a sewage system is authorized to deny an application for a sewage system if such denial appears to it to be in the best interest of the inhabitants of the county or town.").

¹⁴ Section 15.2-2157(C).

¹⁵ Section 32.1-164(B)(3) & (15) (2011).

¹⁶ 12 VA. ADMIN. CODE, §§ 5-610-20 through 5-610-1170:7.

¹⁷ See 12 VA. ADMIN. CODE, § 5-613-10 (defining "maintenance" as "performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drainfield piping, and distribution boxes or work requiring a construction permit and an installer."); see also 12 VA. ADMIN. CODE, § 5-613-80 (providing performance requirements for alternative systems).

¹⁸ See 12 VA. ADMIN. CODE, § 5-610-710.

and implemented through the Virginia Department of Health, provided that those standards are not related to alternative system maintenance. In response to Delegate Lingamfelter's first question, the March 9, 2012, Opinion found that a locality may not adopt a maintenance standard that exceeds the standards set by the Board of Health and, thus, that the specific bond requirement detailed in the facts of the letter was impermissible pursuant to § 15.2-2157(D).¹⁹ In response to the second question, this Office opined that a non-maintenance standard that exceeded state regulations is not a violation of § 15.2-2157, "provided [such regulations] do not function so as to in effect ban the use of an alternative system where the state regulations would allow for its operation."²⁰

Delegate Lingamfelter did not ask, and the Opinion did not address, whether the local non-maintenance standards exceeding the regulations promulgated by the Board of Health contemplated in his question were permissible in cases where sewers or sewerage disposal facilities were not available. Rather, the question presented in Delegate Lingamfelter's letter was silent as to whether sewage facilities were available. Therefore, the 2012 Opinion is consistent with the findings of the 2010 Opinion, and the two can be read together as holding that localities cannot enact ordinances with standards or requirements greater than those of the state regulations where sewers or sewage facilities are not available.

The Commonwealth follows the Dillon Rule of strict construction, which "provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."²¹ Thus, "[w]hen a local ordinance exceeds the scope of this authority, the ordinance is invalid."²² Where sewers or sewage facilities are not available, Virginia Code §§ 15.2-2157(C) and (D) prohibit a locality from establishing standards and requirements for the use of alternative onsite systems which exceed those established by the Alternative Onsite Sewage Regulations administered by the Department of Health. Any local ordinance that requires more stringent standards than those found within the state regulations would act, in effect, to ban the use of an alternative system where the state regulations would allow for its operation.²³ Therefore, to the extent that public sewer facilities are unavailable and there are any requirements for alternative systems in a locality's ordinance which are in excess of the requirements set forth in the Board of Health's regulations, the ordinance exceeds the scope of the authority granted to localities pursuant to §§ 15.2-2157(C) and (D) and violates the Dillon Rule.

¹⁹ See 2012 Op. Va. Att'y Gen. No. 11-100 at 3-4.

²⁰ *Id.* at 4.

²¹ *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (quoting *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008)). See also *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 502-05, 522 S.E.2d 610, 612-14 (1999) (citing *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455-56 (1975) in applying corollary rule to counties).

²² *City of Chesapeake v. Gardner Enters. Inc.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997); see also *Bd. of Supvrs. v. Reed's Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) ("If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body").

²³ See 2010 Op. Va. Att'y Gen. at 53. Section 15.2-2157(D), unlike subsection (C), does not contain the language, "[w]hen sewers or sewerage disposal facilities are not available;" therefore, it is presumed that the General Assembly intended for subsection (D) to apply whether or not a sewer or sewerage disposal system is available. See *Logan v. City Council*, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) ("We determine the General Assembly's intent from the words employed in the statutes."); see also *City of Richmond v. Confreere Club of Richmond*, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990) ("Legislative intent is determined from the plain meaning of the words used.").

Honorable Stephen H. Martin

November 9, 2012

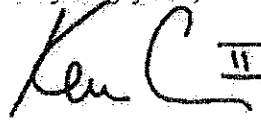
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Conclusion

Accordingly, it is my opinion that a Virginia locality cannot adopt requirements and standards for alternative onsite sewage systems that are in addition to or more stringent than those enacted by the Board of Health and administered through the Virginia Department of Health when the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized with a large, sweeping "K" and a cursive "C" followed by the Roman numeral "II".

Kenneth T. Cuccinelli, II
Attorney General